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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,
Appellant,

vs.

MARGARET B. LAU,
Appellee.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT.

EDWARD S. MACIE,
111 W. Washington — Suite 1742
Chicago 2, Illinois
Attorney for West Towns Bus Company,
a corporation of Illinois,
Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

WEST TOWNS BUS COMPANY, a corporation of Illinois,
Appellant,

vs.

MARGARET B. LAU,
Appellee.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT.

(a) *The official report of the opinion of the state supreme court is:* 16 Ill. 2d 442; a copy of said opinion is attached hereto, marked **Appendix A.**

(b) *Statement of the grounds on which the jurisdiction of this court is invoked:*

(i) This was a state court action at law by appellee against appellant, a reorganized bankruptcy debtor, for damages for personal injuries allegedly sustained by appellee, as passenger, from the negligent operation of a motor bus by the bankruptcy trustee. Appellee recovered verdict and judgment for Seventy-Five Thousand Dollars; on appellant's appeal to the state

supreme court, the judgment was affirmed. The affirmance was on the basis of certain provisions of the state civil practice act which were held by the state court to authorize (a) an increase in the *ad damnum* in the state court suit and (b) a substitution of appellant as defendant, *both three and one-half* years after the bankruptcy Consummation Order (the applicable state limitation statute being 2 years), contrary to appellant's contention that such a construction or application of these state practice act provisions would make them invalid as repugnant to the U. S. Bankruptcy Act and the U. S. Constitution.

(ii) The date of the judgment of the supreme court of Illinois sought to be reviewed and the time of its entry are: March 20, 1959. The date of the order denying appellant's petition for rehearing is May 19, 1959. The Amended Notice of Appeal was filed on August 11, 1959 in the supreme court of Illinois.

(iii) The statute believed to confer jurisdiction on this court: U.S.C. Title 28, Section 1257(2).

(iv) Cases believed to sustain the jurisdiction:

Fiske v. *Kansas*, 274 U.S. 380, 385-386.

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63, 66-67.

Standard Oil Company v. *Johnson*, 316 U.S. 481, 482-483.

(v) Validity of the following statutes of the State of Illinois is involved:

Ill. Rev. Stat. 1957, Vol. 2:
(p. 990) Ch. 110, sec. 34
(p. 992) Ch. 110, sec. 46
(p. 994) Ch. 110, sec. 54

The pertinent text thereof is set out in **Appendix C** hereto.

(c) *The questions presented by the appeal.*

In view of the applicable Illinois limitation statute of two years for claims for personal injuries (Ill. Rev. Stat. 1957, Ch. 83, sec. 15), are the specified Illinois practice act sections, as construed and applied by the state court, invalid on the ground of being repugnant to the constitution and laws of the United States, particularly the National Bankruptcy Act:

(i) In allowing an increase of the original *ad damnum* three and one-half years after the entry of the bankruptcy court Consummation Order?

(ii) In allowing appellant to be made defendant three and one-half years after such Consummation Order?

(iii) In imposing liability on appellant for a non-employee negligence claim against the bankruptcy trustee, absent any showing that the trustee had been authorized to incur or pay such claim or that appellant, under the Consummation Order, succeeded to trustee's liability?

(d) *Statement of the case.*

1. Debtor, an intra-state public utility engaged in the transportation of passengers for hire, was in reorganization in the U. S. district court under Chapter X of the Bankruptcy Act for seven years from July 1, 1947 to July 1, 1954. During the reorganization proceeding, appellee Lau on March 6, 1953 filed suit in the state court against the reorganization trustee for personal injuries claimed to have been suffered by her because of the trustee's alleged negligence on May 10, 1952 in operating a bus on which she was a passenger; one Hathaway, as operator of a colliding vehicle was made co-defendant.

The complaint prayed judgment against defendants for $35,000.

2. The district court order of July 1, 1947 appointing the original reorganization trustees (abs. 63-70) authorized the trustees to operate debtor's business (abs. 66); to pay any claims for wages, services, labor, supplies, materials, equipment or otherwise, which may be entitled to priority under the Bankruptcy Act (abs. 67); "to open new books of account" as of the date of the order (abs. 68). So far as the record shows there was no district court order authorizing the trustee to pay claims for personal injuries to non-employees.

3. A Plan of reorganization was proposed by the trustee, approved, accepted and confirmed; it was ordered consummated by a Consummation Order entered on July 1, 1954. The Plan found debtor to be insolvent; it found valueles and declared null and void "all general or unsecured claims against the debtor and the shares of stock of all classes" (abs. 85); the previous first mortgage bonds in the aggregate amount of $2,124,800 were ordered replaced by a new issue of income bonds in the aggregate sum of $1,381,120, each $1,000 old bond receiving a $650 new bond and 35 shares of new no-par-value stock (abs. 90).

4. The Consummation Order (abs. 77-91) provided that the property should vest in the new Company (the reorganized debtor) "free and clear of all rights, claims, interests, liens and encumbrances of the creditors" and stockholders of debtor, except as provided in the order (abs. 81); that the Company shall assume and pay in due course (a) claims of creditors entitled to priority by reason of the Bankruptcy Act or State or Federal law (abs. 83); (b) claims of U.S. for taxes after adjudication thereof (abs. 85); (c) claims on any Trustee's Certificates of Indebtedness (abs. 84); (d) claims and obligations

"falling within the classes of claims which the Trustee has been authorized to incur or pay in the operation of the properties of the debtor or otherwise by any order or orders of the Court, when the amounts thereof have finally been determined," (abs. 84). The Order further provided that the obligation of the Company to pay such claims "shall in each case be subject to any and all applicable statutes of limitation without any tolling thereof by virtue of this order." The Final Decree entered September 21, 1956 (abs. 91-96) perpetually enjoined any action against the Company "by reason of or on account of any obligation or obligations incurred by the Debtor or by either of the Trustees of the Debtor's property, except any obligation imposed upon said Company by the Consummation Order." (abs. 94-95)

5. As noted, appellee's state court suit was filed on March 6, 1953. Appellee took no further action thereon until January 29, 1958 (three and one-half years after the Consummation Order) when on appellee's motion, she was allowed to amend her complaint on its face by increasing the *ad damnum* from $35,000 to $175,000 (abs. 5). Subsequently, on February 28, 1958, appellee was again allowed to amend by dismissing defendant Hathaway and substituting appellant West Towns Bus Company in lieu of the reorganization trustee. The case went on trial on March 26, 1958 (abs. 28). Before the trial commenced, there was a conference in the trial judge's chambers at which appellant's counsel contended that the court did not have jurisdiction of the person of appellant either by summons or by entry of appearance and asked leave to file appellant's appearance and answer, which motion the court denied (abs. 30-33) saying

> "The answer that you submitted, so far as pertinent facts, a denial of liability here, is just the same.

> **The only difference in your answer that you tender here is a bunch of new matters which is purely a legal question and I want you protected on that of course. But they won't come up during the trial. I don't think there will be any harm done to either side—I hope not. It is not my intention not to give you a fair trial." (abs. 33)**

Thereafter, appellant filed a written motion (abs. 6-8) for leave to file its appearance and answer (tendered as Exhibit A to the motion (abs. 8-12)) setting up the history of the bankruptcy reorganization averring that at the time of the accident, the possession, control and operation of the motor bus were in the trustee and that appellee had not alleged any facts entitling appellee to recover against appellant; also averring that any action of appellee against appellant (and particularly any action in excess of the original $35,000 *ad damnum*) were barred by the state two-year limitation statute.

On April 1, 1958, appellee was given leave to file an amended complaint containing new specific allegations of negligence and with the $175,000 *ad damnum* (abs. 12-14). Appellant, on that same day, filed its written motion (abs. 15-16) renewing its motion for leave to file answer to the complaint as amended and moving for a dismissal, averring that it was entitled to this relief by virtue of the U. S. laws, particularly Chapter X of the Bankruptcy Act and by the U. S. Constitution, particularly **Art. I-8**—(the power of the Congress to establish a uniform bankruptcy act) **Art VI**, (the U. S. constitution and laws pursuant thereto are the supreme law of the land); and Amendment **XIV, Sec. 1** (prohibiting making or enforcing any law to abridge privileges or immunities of U. S. citizens or depriving any person of property without due process). The trial court overruled appellant's motion (abs. 16);

the trial proceeded; verdict was rendered against appellant for $75,000 with judgment on the verdict (abs. 17) and appellant's post-trial motion (abs. 17) was thereafter denied (abs. 27).

The stage in the proceedings in the court of first instance and the manner in which the federal questions sought to be reviewed were raised.

Appellant prior to the commencement of the trial appeared by counsel and moved for leave to file its appearance and answer raising the following points:

(1) *There is no liability on appellant as re-organized debtor, for the claim of appellee, a non-employee, against trustee for his alleged negligence.* (abs. 10-11):

> "10. . . . During the aforesaid period when said Raymond T. O'Keefe, Jr., as trustee, was possessed of, in control of, and operating said motor bus line and said motor bus (and in particular on the date of the occurrence described in the complaint) this defendant was not possessed of, in control of, or operating said motor bus line or any motor bus line, or said motor bus or any motor bus.
>
> "11. This defendant denies that plaintiff has alleged any properly pleaded facts, from which it follows as a conclusion of law, that plaintiff is entitled to any recovery against this defendant."

(2) *Any cause of action by appellee against appellant is barred because it did not occur within two years prior to date appellant was made defendant in state court suit:*

> (abs. 11) "12. This defendant, West Towns Bus Company, was made party defendant to this cause on February 28, 1958 by order then entered by this court on motion of plaintiff. Even if plaintiff ever had any right to recover against this defendant, West Towns Bus Company, and this defendant ever had any liability to plaintiff, said right and said liability accrued

more than two (2) years prior to the entry of said order on February 28, 1958, wherein and whereby this defendant, West Towns Bus Company, was first made party defendant to this case, and therefore any cause of action of plaintiff against West Towns Bus Company has been and is barred by the two (2) year statute of limitations, Ill. Rev. Stats. Chapter 83, Section 15."

(3) *Any cause of action against appellant for an ad damnum in excess of $35,000, is barred because appellant, after entry of Consummation Order, is estopped from increasing previous the ad damnum and because of the two year limitation statute.*

(abs. 11-12) "13. The original complaint herein contained an *ad damnum* in the sum of $35,000. On January 29, 1958, on motion of plaintiff, the complaint was amended to increase said *ad damnum* to $175,000. If there is any liability of this defendant to plaintiff for any sum whatever because of the occurrence described in plaintiff's complaint (which this defendant denies) the maximum liability would be the sum of $35,000, the ad damnum in the original complaint which ad damnum was not amended until January 29, 1958. The liability of this defendant for any sum, and in particular for any sum in excess of $35,000, did not accrue within two (2) years prior to January 29, 1958 but accrued, if at all, over two (2) years prior thereto on July 1, 1954; the liability, if any, of this defendant for any damages in excess of the sum of $35,000, the original ad damnum in said complaint, has been barred and is barred by the two (2) year Illinois Statute of Limitations, Ill. Rev. Stat. Ch. 83, Sec. 15."

The court denied appellant's motion (abs. 30, rec. 189-190).

Appellant, during the trial on April 1, 1958, renewed its motion as follows (abs. 15-16):

"New comes West Towns Bus Company, a corporation, defendant, and

1. Renews the motion heretofore made by it for leave to file instanter its answer to the complaint, as amended, which motion was heretofore denied by the court, and

2. Moves the court for a dismissal of this action against it.

Defendant avers that it is entitled to the foregoing relief by virtue of the laws of the United States, particularly Chapter X of the United States Bankruptcy Act, and by the provisions of the United States Constitution, particularly Article I, Section 8 providing that Congress shall have power to establish a uniform bankruptcy act; Article VI—that the United States Constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land; Amendment XIV, Section 1, that no State shall make or enforce any law which will abridge privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law and that this defendant, by virtue thereof, has a right, title, privilege and immunity under the Constitution and statutes of the United States which it is hereby specially setting up and claiming."

The court denied appellant's motion (abs. 16, rec. 101).

In appellant's post-trial motion (abs. 17-26) appellant renewed the points in par. 10(a) and 10(b) (abs. 22) par. 5(c) (abs. 20), par. 5(d) (abs. 20-21) and par. 9 (abs. 21-22). The court denied appellant's post-trial motion (abs. 27, rec. 133)

The stage in the proceedings in the state appellate court at which and the manner in which the federal questions sought to be reviewed were raised.

(appellant's open. br.—p. 7)

"(b) Further even if it could be held that the court had jurisdiction of the person of this defendant, the judgment would be contrary to the provisions of the U.S. Bankruptcy Act and the applicable orders of the U.S. district court, and therefore in violation of the provisions of the U.S. Constitution that the Constitution and laws of the United States made in pursuance thereof, shall be the supreme law of the land."

(appellant's open. br., p. 9)

"4. Even if the variance could be disregarded between the theory of plaintiff's case under her pleadings and the theory of plaintiff's case under her proof, plaintiff could not recover on the record here because plaintiff has not proven any cause of action against this defendant."

(appellant's open. br.—p. 9)

"5. But even if it should be held (contrary to defendant's contention above) that by virtue of the Consummation Order of July 2, 1954, plaintiff then became vested with a right of action directly against defendant, this right of action has been barred as an entirety because defendant was not made party defendant within two years from the date of such Consummation Order."

(appellant's open. br.—p. 10)

"6. Even if plaintiff's cause of action as an entirety against West Towns Bus has not been barred by the federal court orders and the applicable two year Illinois limitation statute, nevetheless the federal court orders and this applicable two year statute, bar any increase in ad damnum from the $35,000 figure in effect at the time of the Consummation Order, because presumably it was on the basis of the maximum liability of the reorganized debtor as disclosed by the ad damnum then in effect in this (and other suits)

that the U.S. court found the plan of reorganization to be 'fair, equitable and feasible' and ordered it confirmed and consummated.".

(c) *The grounds upon which it is contended that the federal questions are substantial.*

1. *The holding of the state court that after a reorganization plan has been approved and Consummation Order entered on the basis of existing claims against the trustee, including a state court suit with a named ad damnum, nevertheless, under the provision of the state practice act, the state court has power thereafter to allow the ad damnum to be increased, would make such provision of the state practice act invalid because repugnant to the Bankruptcy Act.*

Chapter 10 of the Bankruptcy Act Tit. 11 501-676 requires that there should be disclosure to the district court of the *maximal* liability on all claims against the estate, because only with such information can an informed judgment be made by the trustee, the security holders, and the court as to whether a proposed plan is fair, equitable and feasible. If unliquidated claims have been presented for an aggregate of X dollars, the feasibility of a plan, particularly one imposing liability (whether absolute or qualified) upon the reorganized debtor for such claims, will necessarily be based upon such maximum. If the claimed maximum is such that the imposition of liability therefor would or could render the plan unfeasible, the bankruptcy court could and would order a liquidation of the claims before proceeding with the plan, this liquidation to be made by the court itself if deemed necessary. If after a plan has been approved, confirmed and consummated by the court on the basis of the named *ad damnum*, the claimant thereafter were to be allowed in the state court to increase this,

named *ad damnum*, on the basis whereof the court had found the plan to be feasible, the feasibility of the consummated plan could and in many cases probably would, be jeopardized. In the instant case at the time the plan was confirmed and consummated, appellee had a suit against the trustee pending in the state court with an *ad damnum* of $35,000; the trustee, security holders and the bankruptcy court had a right to regard that figure as a *maximal* liability on appellee's claim and to make determination of the feasibility of the plan accordingly. But if after the Consummation Order appellee can be allowed in the state court to increase that *ad damnum*, this would *destroy one of the important bases on which the plan had* been held to be feasible. This conclusion is particularly applicable to the claim for personal injuries by appellee, a non-employee, since such claim has no priority and would be subjected to the prior lien of the mortgage creditors. *Brooks* v. *St. Louis-San Francisco Railway Company*, 8 Cir., 1950, 180 F. 2d 185, *In re New York N.H. & H.R.Co.*, 2 Cir., 1937, 92 F. 2d 428; the Plan here found the debtor to be insolvent and cut the principal of the first mortgage bonds to 65% of their former face value.

The state court, relying on section 34 of the state practice act (Ill. Rev. Stat. 1957, Ch. 110, § 34 (**App. C** 14a) held that this increase in the *ad damnum* was valid, saying, (without citing authority): (**App. A** 9a) "Moreover, section 34 of the Civil Practice Act (Ill. Rev. Stat. 1957, Chap. 110, par. 34) provides that the prayer for relief does not limit the relief obtainable except in cases of default. The parties to the bankruptcy proceeding were presumed to know such well settled principles of law and the contention that the plaintiff was estopped from amending the *ad damnum* is without merit." Appellant submits that the converse is true; that appellee having sued a bankruptcy trustee, was "presumed to know" the well settled principles of bankruptcy re-

organization law, including appellee's obligation to apprise the bankruptcy court of the full *ad damnum* of appellee's claim, so that the bankruptcy court could make an informed judgment as to whether a reorganization plan "fair, equitable and feasible" could be accomplished. It is one thing for § 34 to allow amendments in the prayer and *ad damnum* in the ordinary action where the parties themselves are the only one concerned, but is quite otherwise to allow such amendment in the instant case where to do so would prejudice third parties who had acted in reliance on the previous *ad damnum*.

If disclosure had been made in the bankruptcy court that a non-employee whose claim was not an operation expense and therefore was subordinate to the first mortgage lien, purposed after the plan had been consummated to increase the named *ad damnum* from $35,000 to $175,000, the first mortgage bond holders who under the plan were required to reduce the principal of their bonds to 65% of the face and to take income bonds instead of the existing fixed interest bonds, might well have refused to accept these impairments of the amount and nature of their security and have insisted on a liquidation of the bankruptcy estate, in which case appellee possibly (and even probably as the debtor's history shows here) would have had nothing out of which to make recovery on her claim. And if disclosure had been made of any purpose on the part of appellee to increase her *ad damnum* by such a substantial percentage, it is possible and even likely, that the bankruptcy court would have insisted on a speedy adjudication of appellee's claim, and held up and re-shaped the plan in the light of such adjudication. But relying on the existing *ad damnum* as a maximal liability, the security holders agreed to the plan with its impairment of their rights and the court ordered it confirmed and consummated. After the plan has been con-

summated on this basis and the security holders have changed their position to their disadvantage, it would be inequitable to allow appellee to increase this *ad damnum;* appellee is estopped.

Appellant recognizes that the precise question is novel and so far as appellant can find, has not been passed upon.* But the controlling general principles of the law of estoppel are well established and easy of application. If one person by his conduct leads a second to believe that a certain representation by the first is true and to act on that representation, so that it would be to the second's disadvantage if the representation were not true, then the first is precluded or estopped from setting up that the representation is not true. *Davis* v. *Wakelee,* 156 U.S. 680, 689-691; 31 C.J.S. Estoppel, § 107, Equitable estoppel; quasi-estoppel; 19 Am. Jur., Estoppel, § 33 (Equitable Estoppel or Estoppel in Pais) Generally, § 34, Definitions. Where appellee, by filing a state court suit with an *ad damnum* of $35,000 led the security holders, the trustee and the bankruptcy court to believe that this *ad damnum* represented appellee's maximal claim and on that basis to cause a plan to be accepted, confirmed and consummated with the security holders changing their position, appellee is estopped thereafter from changing this previous representation as to maximal damage and increasing the *ad damnum* by 400% to $175,000.

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* Appellant has not found any case where this issue was considered, although in **Reconstruction Finance Corporation vs. Flynn,** 175 F 2d 761 (CA 2, 1949) there was a dictum that supports appellant's theory: (p. 763) "Possibly in other situations where a showing can be made of action in reliance by participating creditors upon the absence of a claim the bankruptcy court might exercise its discretion in weighing the equities, to refuse a priority retroactively created and applied for after the plan had been confirmed."

Nor is there any inequity in appellant's position. The nature and amount of appellee's injuries were peculiarly in the knowledge of appellee, not of the trustee or the security holders or the bankruptcy court; if appellee for any reason refrained from disclosing to the bankruptcy court the true amount of appellee's claim until after the bankruptcy reorganization has been completed, that is a decision for which appellee should bear the responsibility.

Appellant's objection to the allowance of the increase in the *ad damnum* is particularly pertinent here where the state court opinion concedes that the judgment is high, saying (**App. A** 11a): "It is true that the verdict is large in comparison to the expenses of plaintiff . . . . . although the verdict may well be in excess of the amount which the judges of this court would have allowed if they had heard the evidence and made the original determination . . ." The court's language and decision seem to be at variance with *Foust* v. *Munson Steamship Lines*, 299 U.S. 75. There a steamship line was under reorganization in bankruptcy under section 77-B. Plaintiff had a claim for personal injuries received by him in the course of his employment as a seaman, the prosecution of which claim in the state court had been enjoined by an injunction issued immediately and *ex parte* in the bankruptcy proceeding. Plaintiff moved to vacate this injunction and for leave to sue in the state court, which motion was overruled by the bankruptcy court, the order being affirmed by the court of appeals, 82 F. 2d 289. This court reversed, holding that while the bankruptcy court had the power to keep before it the liquidation of such claims, if such action was necessary for the effective administration of the bankruptcy proceeding, that a showing to that effect was required, and that no sufficient showing had been made. This court adverted to the

argument that only by keeping the liquidation of this claim in the bankruptcy court could an excessive award be prevented; the court pointed out that such reasoning overlooked the fact that courts had both the *right* and the *duty* to set aside excessive verdicts:

> (p. 84) "There is no support for the stay in the suggestion of the Circuit Court of Appeals to the effect that in negligence cases juries often give verdicts larger than reason justified. It is to be remembered that if without support in the evidence or contrary to the law they may be set aside. (citing cases) It must be assumed that the courts by appropriate exertion of their power will adequately safeguard against verdicts shown to be arbitrary and unjust."

2. *The holding of the state court that the state two-year limitation statute should not be applied here because of an amendment to the state practice act adopted after the Consummation Order—would make such amendment invalid as repugnant to the Bankruptcy Act.*

Under the Consummation Order of July 1, 1954, any liability against appellant is subject to the state limitation statute;

> (par. 7, abs. 84), "The obligation of the company to pay such claims shall in each case be subject to any and all applicable statutes of limitation without any tolling thereof by virtue of this order."

The applicable state statute (Ill. Rev. Stat. 1957, Ch. 83, § 15) provides for a two year period of limitation on claims for personal injuries. Appellee refrained from suing appellant until February 28, 1958, being over three and one-half years from the date of the Consummation Order and over one and one-half years after the two year limitation statute had expired. Appellant therefore contended that under the qualification of the Consumma-

tion Order any claim against it was barred. But the state court ruled otherwise, on the ground that by virtue of an amendment to the state Practice Act, July 1, 1955 (Ill. Rev. Stat. 1957, Ch. 110, § 46 adopted one year after the Consummation Order) the limitation period referred to in the Consummation Order had been expanded. The question is therefore presented whether such amendment if applicable here, is invalid as repugnant to the Bankruptcy Act.

Appellant submits that under the Bankruptcy Act, the rights and liabilities of all the parties affected thereby become vested and fixed as of the date of the Consummation Order and are not subject to change thereafter by unilateral action and that any subsequent state legislation attempting to change these vested rights and liabilities is repugnant to the Bankruptcy Act and therefore invalid; the Bankruptcy Act, as a law of the United States, made in pursuance of the Constitution is "the supreme law of the land" (Constitution, Article VI). Admittedly, as of the date of the Consummation Order (July 1, 1954), any suit by appellee against appellant under the then state law was required to be brought within two years, that is on or before June 30, 1956. Admittedly appellee did not sue appellant within that two year period, but waited until over one and one-half years thereafter. So on the basis of the state limitation law *as it existed as of the Consummation Order*, appellee's claim against appellant would be barred; the state court holds otherwise, relying on the state amendment to the Practice Act adopted one year after the Consummation Order. Appellant submits that if this amendment be construed (as the state court construed it) to relate to appellant's claim here, that the amendment would be repugnant to the Bankruptcy Act and invalid. Appellant recognizes that the question is a novel one not heretofore passed upon but submits that

appellant's conclusion follows necessarily from the general principles.

In reference to appellant's point that even if the present (amended) wording of § 46 were retroactively applicable, there is a condition precedent to liability, namely "(e) service upon the person, his agent or partner," which was not met here, the state court says (**App. A** 7a): "We believe that the express assumption of the receiver's (trustee's *semble*) liabilities and obligations by the defendant under the bankruptcy court's consummation order amounted to an acceptance of the service of process on O'Keefe as trustee, as service upon an agent of defendant." The statement misapprehends the record which does not show any "express assumption by defendant", the Consummation Order not containing any assumption by appellant but requiring affirmative action by appellant to constitute an assumption and no such affirmative action appearing. Further, the conclusion about appellant's adopting the service on O'Keefe has no support in law. Even under the present wording of section 46, the test of agency is of the time of service and there is no warrant for holding that service on A, who at that time was *not* the agent of B, can later on become service on B because of some subsequent act of the latter.

The holding of the state court that the transfer of the mortgaged bus line assets by the reorganization trustee to the reorganized debtor, appellant here, ipso facto made appellant liable for negligence claims of non-employees against trustee, is repugnant to the Bankruptcy Act, and the rights, titles, privileges and immunities thereunder.

The Act provides, U.S.C., Tit. 11, § 626, that the property dealt with by the reorganization plan when transferred by the trustee to the debtor or other corporation provided for by the plan, shall be free and clear of all claims and interests of the debtor, creditors and stock-

holders "except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the tranfer or retention of such property." Appellee here was a non-employee and her claim even if it had been reduced to state court judgment, would not be for an operating expense and would be subject to the prior and superior lien of the first mortgage, *Brooks* v. *St. Louis-San Francisco Railway Company*, 8 Cir. 1950, 180 F 2d 185, citing *In re New York N. H. & H. R. Co.*, 2 Cir. 1937, 92 F 2d 428. U.S.C., Tit. 11, § 205 n. Unless under one of the exceptions in § 626, appellee had no legal claim against appellant.

There is no showing or contention here that appellee's claim is provided for in the plan or in the order confirming the plan; appellee's contention, adopted by the state court, is that the claim is provided for in the Consummation Order. Appellant's liability therefore can only be secondary, for such claims and obligations "falling within the classes of claims which the Trustee has been authorized to incur or pay in the operation of the property of the debtor or otherwise by any order or orders of the Court," (Consummation Order, abs. 84). The record is devoid of any showing that appellee's claim fell within any of such classes; in none of the previous court orders appearing in the record either (i) the original order of July 1, 1947 appointing trustees (abs. 63-70), (ii) the order of September 8, 1947 retaining the original trustees (abs. 71-72), (iii) the order of December 3, 1948, appointing O'Keefe successor trustee (abs. 73-75) or (iv) the order of January 21, 1949 retaining O'Keefe as trustee (abs. 75-76), is there anything authorizing the trustee to incur or pay appellee's claim or any claim of *non-employees* for personal injuries. The conclusion is inescapable: unless the Bankruptcy Act is to be nullified the reorganized debtor took the property from the trustee free

and clear of all claims of appellee, the non-employee creditor.

The state court opinion (**App. A** 7a) overlooked that while an employee's claim for personal injuries may have priority as an administration expense (see U.S.C. Tit. 11, § 205 n, as to railroads engaged in interstate commerce) a non-employee's claim has no priority. The state court's misapprehension is shown by the statement (**App. A** 8a) "This result is further justified by our decision in *Knickerbocker* v. *Benes*, 195 Ill. 434 (63 N.E. 174) in which plaintiff sued for injuries caused by the negligence of a receiver in operating the property." It appears from the above opinion, pp. 439, that *Bene*, the intervenor, received the injuries in question while *employed by the receiver* in the latter's operation of the receivership property. The statement also overlooks the fact that plaintiff in *Knickerbocker* had intervened in apt time in the receivership proceedings to compel payment of her claim out of the receivership funds and that while the purchasers of the property at the foreclosure sale were not made parties to her intervening petition until after the statute had run, they had been parties to the receivership proceeding when she filed her timely petition; appellee herein filed no petition in the bankruptcy proceeding. The opinion also makes no reference to applicable state court cases to the contrary, *Handtoffski* v. *Chicago Consolidated Traction Company*, 274 Ill. 282, 113 N.E. 620 and *Grewenig* v. *American Bakery Company*, 293 Ill. App. 604, 13 N.E. 2d 183.

Appellant is mindful of the provisions of Rule 15, 2(e), that "there shall be included a presentation of the grounds upon which it is contended that the federal ques-

tions are substantial (Zucht v. King, 260 U.S. 174, 176, 177)." Appellant submits that the questions involved in the instant case have not been heretofore passed upon by this court and that they are of such importance to the proper operation of the Bankruptcy Act that they require this court's plenary consideration.

(h) There is appended hereto, marked **Appendix A**, a copy of the opinion of the Supreme Court of Illinois.

(i) There is appended hereto, marked **Appendix B**, a copy of the judgment of the Supreme Court of Illinois, from which this appeal is prosecuted.

Respectfully submitted,

EDWARD S. MACIE,
Attorney for West Towns Bus Company, Appellant.
111 W. Washington—Suite 1742
Chicago 2, Illinois

Appendix A.

Docket No. 34981—Agenda 20—January, 1959

Margaret B. Lau, Appellee v. West Towns Bus Company, Appellant.

Mr. JUSTICE DAVIS delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Cook County, which was entered upon a jury verdict in favor of plaintiff in the sum of $75,000. In addition to alleging error in instructing the jury, and that the verdict was excessive and contrary to the evidence, defendant contends that the court never acquired jurisdiction over it, and that the entry of judgment was an unconstitutional deprivation of its property without due process of law. Upon this debatable constitutional issue defendant appeals directly to this court.

On May 10, 1952, plaintiff was injured while riding on a bus operated by Raymond T. O'Keefe, Jr., as reorganization trustee in bankruptcy, in the United States District Court in the matter of Chicago & West Towns Railways, Inc., a corporation, debtor. The injury occurred when the bus collided with a motor vehicle driven by William Hathaway. On March 6, 1953, plaintiff filed suit against both O'Keefe, as trustee, and Hathaway, alleging that her injuries resulted from their joint negligence, and praying judgment in the sum of $35,000. Both defendants appeared and answered, denying liability.

Thereafter, and while this cause was pending, O'Keefe, as trustee, submitted a plan in the Federal District Court for reorganization of the debtor. On July 2, 1954, a consummation order was entered in the bankruptcy proceeding

by which all of the debtor's property was vested in the reorganized Chicago & West Towns Railways, Inc., a corporation. The order further provided in part as follows:

"(6) The Company shall have the right, if it so elects, to be substituted at its own cost and expense as a party in lieu of the Debtor or of the Trustee in any or all litigation or proceedings by or against the Debtor or the Trustee or to which either of them were parties, now pending, on appeal or otherwise, or to continue such litigation or proceedings in the name of the Debtor or of the Trustee, and the Trustee shall be relieved of any further duty or responsibility in respect of such litigation or proceedings.

"(7) The Company is authorized and directed to pay, in due course, all costs and expenses of administration of the estate of the Debtor which shall be a charge upon the properties herein authorized to be transferred and conveyed to the Company, including costs of printing and mimeographing documents required for consummation of the Plan and the charges of fiduciaries and agents for performing services thereby required, and allowances of fees and reimbursement of expenses heretofore or hereafter incurred to the extent allowable under Chapter X of the Bankruptcy Act, and all other expenditures and allowances which may be approved or made by the Court to the extent that they have not been paid by the Trustee. The Company shall assume at the Closing Time and pay in due course without the further order of this Court, the following claims: • • •

"(d) All claims and obligations falling within the classes of claims which the Trustee has been authorized to incur or pay in the operation of the properties of the debtor or otherwise by any order or orders of the Court, when the amounts thereof have finally been determined,

and to the extent that they have not been paid by the Trustee.

"The obligation of the Company to pay such claims shall in each case be subject to any and all applicable statutes of limitation, without any tolling thereof by virtue of this order. The Board of Directors of the Company is hereby authorized to provide for the adjustment, compromise, payment, discharge, installment payment, or other disposition by the Company of all claims, liabilities and obligations.

"(8) From and after the Closing Time there shall be no liability upon the Trustee for any obligations incurred by him in his official capacity as such Trustee growing out of his operation theretofore of the property and business of the Debtor pursuant to the authorizations of this Court, and the Company shall be and become liable for any and all such obligations and shall indemnify and hold the Trustee harmless against such obligations."

Thereafter the corporation took over the operation of the bus line, and on November 29, 1956, changed its name to West Towns Bus Company. On February 15, 1957, present counsel for defendant entered their substitution of appearance for defendant O'Keefe, as trustee, although he had previously been discharged as such trustee. On January 29, 1958, on motion of plaintiff for leave to amend her complaint *instanter*, the *ad damnum* was increased from $35,000 to $175,000; and on February 28, 1958, on plaintiff's motion, the trial court dismissed Hathaway as a party defendant and substituted in lieu of defendant O'Keefe, as trustee, the present defendant, West Towns Bus Company, herein referred to as defendant.

The trial before the jury began on March 26, 1958. Present counsel appeared for defendant and moved for leave to file its appearance and answer. The answer admitted the operation of the motor bus by O'Keefe, as trustee, and the collision, denied any act of negligence on the part of O'Keefe, as trustee, and the injuries of plaintiff, and averred that defendant was not operating the motor but at the time of the accident, and that the cause of action against it is barred by the Statute of Limitations. The court denied the motion and ordered that the appearance and answer filed on behalf of O'Keefe, as trustee, stand as the appearance and answer of the defendant, West Towns Bus Company. This motion was renewed on April 1, 1958, at which time the court entered an appropriate written order of denial. On April 2, 1958, judgment was entered on the verdict finding defendant guilty and assessing plaintiff's damages in the sum of $75,000.

Defendant contends that the court had no jurisdiction over it because it was not served with summons; that no cause of action was pleaded or proved against it; and that any cause of action against it is barred by the Statute of Limitations, and in any event, the increase in the *ad damnum* is so barred.

We believe the defendant was properly before the court without service of summons. Section 20 of the Civil Practice Act, (Ill. Rev. Stat., 1957, chap. 110, par. 20,) provides that: "(1) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance. * * * (3) If the court sustains

the objection, an appropriate order shall be entered. Error in ruling against the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amendable to process issued by a court of this State."

In the case at bar, defendant made no special appearance as required by the statute, and fully participated in the entire trial. We conclude that defendant has appeared generally so as to give the trial court jurisdiction over it. (*Lord* v. *Hubert*, 12 Ill. 2d 83; *People* v. *Estep*, 6 Ill 2d 127.) Since it clearly appears that defendant had notice of the proceedings, an opportunity to be heard and in fact was heard, the enforcement of the judgment against it is not a denial of due process.

Sections 54(1) of the Civil Practice Act, Ill. Rev. Stat., 1957, chap. 110, par. 54(1),) provides: "(1) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parites be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause."

This authorized the substitution of the defendant for O'Keefe, as trustee. Subparagraph 5 of the same section provides: "Parties against whom relief is sought, substi-

tuted under subsections (1) and (2) hereof, shall be brought in by service of process. Service of process on parties substituted under subsections (3) and (4) hereof is not required, but notice shall be given as the court may direct." In the case at bar, the requirement of service of process was eliminated by defendant's appearance and participation in the trial of the cause.

We next consider the plea of the Statute of Limitations. Section 46 of the Civil Practice Act, (Ill. Rev. Stat. 1957, chap. 110, par. 46,) liberally provides for amendments, at any time before judgment, introducing any party who ought to have been joined as plaintiff or defendant. Subsection (4) of section 46 provides as follows: "(4) A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (a) the time prescribed or limited had not expired when the original action was commenced; (b) failure to join the person as a defendant was inadvertent; (c) service of summons was in fact had upon the person, his agent or partner, as the nature of the defendant made appropriate, even though he was served in the wrong capacity or as agent of another; (d) the person, within the time that the action might have been brought or the right asserted against him, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him; and (e) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other

matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended."

Defendant contends that section 46 does not permit the amendment increasing the *ad damnum* to relate back to the original complaint for the reason that service was not in fact had upon the defendant, its agent or partner, and that defendant did not know the original action was pending within the limitation period. We believe that the express assumption of the receiver's liabilities and obligations by the defendant under the bankruptcy court's consummation order amounted to an acceptance of the service of process on O'Keefe, as trustee, as service upon an agent of defendant. At all times the bus line was a single entity, the title to which passed from the trustee to the defendant. By the consummation order, defendant stepped into the position of the trustee, O'Keefe, and assumed his obligations. O'Keefe's liability was not personal, but was limited to the trust corpus—the bus line. In taking title to the bus line, the defendant expressly took over the liability of the trustee in connection with the operation of the line during reorganization. As we stated in *Geneva Construction Co.* v. *Martin Transfer and Storage Co.*, 4 Ill. 2d 273, at pages 287, 289 and 290: "The present section 46 is the culmination of continuing efforts on the part of the General Assembly to enact a provision under which the relation back of an amended pleading would be governed by considerations of fairness to the litigants, rather than by technical and formal considerations. * * * Statutes of limitation, like other statutes, must be construed in the light

of their objectives. The basic policy of such statutes is to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible. That purpose has been fully served here."

In the case at bar, trustee O'Keefe was liable to the extent of the assets of the bus line, for injuries caused by its negligent operation. Under the consummation order, defendant assumed this liability. There is no reason in law or logic to require plaintiff to first establish liability against O'Keefe, as trustee, and subsequently against his successor in interest. The order substituting trustee O'Keefe's successor in interest as party defendant related back to the original complaint, and the substitution is not barred by the Statute of Limitations. This result is further justified by our decision in *Knickerbocker* v. *Benes*, 195 Ill. 434, in which plaintiff sued for injuries caused by the negligence of a receiver in operating a laundry. Defendants were successors to the assets in the hands of the receiver, but were not made parties to plaintiff's petition until after the statute had run. We there held that damages for injuries arising during the receivership, caused by the neglect of the receiver's agents or employees, are part of the operating expense of the receivership and are payable out of its income or corpus. We concluded that defendants, who received the corpus from the receiver, *pendente lite*, were properly made parties after the Statute of Limitations had run.

Nor do we find error in the amendment of the complaint increasing the *ad damnum* to $175,000. All of the elements of damage were included in the original complaint, and an investigation thereof was necessary to a proper defense. Such amendment was no more than an additional claim for damages arising from an occurrence fully described in the

original pleading and has heretofore been regarded as a matter of form rather than substance. (*Geneva Construction Co.* v. *Martin Transfer and Storage Co.*, 4 Ill. 2d 273.) Moreover, section 34 of the Civil Practice Act, (Ill. Rev. Stat., 1957, chap. 110, par. 34), provides that the prayer for relief does not limit the relief obtainable except in cases of default. The parties to the bankruptcy proceeding were presumed to know such well settled principles of law, and the contention that the plaintiff was estopped from amending the *ad damnum* is without merit.

Defendant further contends that the verdict was against the preponderance of the evidence; that the court erroneously refused certain of defendant's instructions and its special interrogatory; and that the verdict was excessive.

As to the first contention, it is the function of the jury, subject to the supervision of the trial court, to determine the preponderance of the evidence, and a reviewing court will reverse only if this determination is against the manifest weight of the evidence. *Butler* v. *O'Brien*, 8 Ill. 2d 203; *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614; *Vandeveer* v. *Preston*, 13 Ill. App. 2d 29.

On May 10, 1952, the plaintiff boarded the bus which was proceeding north on Harlem Avenue. She did not obtain a seat, but stood in the aisle. Other passengers also stood in the aisle, including a large man who was behind her. It is undisputed that the bus stopped suddenly; that this man was thereby thrown forward and into the plaintiff; that he thus struck the plaintiff forcibly and knocked her to the floor of the bus and fell upon her; and that she was thereby injured. Defendant concedes that "there is a sharp conflict as to the evidence immediately preceding the accident." At the time, traffic was heavy,

and Hathaway was driving an automobile in the middle north-bound lane beside the bus. He testified that the bus driver swerved to the left and collided with his automobile, hitting the front door. The bus driver testified that Hathaway turned toward the curb and his car struck the bus. There was some evidence that there were boxes in Hathaway's car, obstructing his vision. We have examined the record and noted the conflict in the evidence, but we cannot say that the verdict of the jury was contrary to its manifest weight.

We have examined the instructions given by the court, and believe the jury was fully and accurately instructed concerning both the defendant's and plaintiff's theory of the case. The instructions offered by defendant and refused by the court were either misleading, or completely covered by other instructions. Where several instructions embodying the same legal principle are submitted to the court, it may select the one it sees fit and not repeat the same proposition of law in different language in separate instructions. (*Wintersteen* v. *National Cooperage and Wagdenware Co.*, 361 Ill. 95.) Upon considering the instructions as a series, we find no prejudicial error in the manner in which the court instructed the jury.

Defendant's special interrogatory was ambiguous and couched in terms which presumed negligence of Hathaway in the operation of his automobile—a fact in dispute. It was therefore properly refused.

Defendant fervently urges the excessiveness of the verdict, portrays the comparatively slight increase in the salaries of judges since 1925 in relation to the substantial increase in jury verdicts, and calls upon us to stand as a bulwark against inflation in jury verdicts. However, it has long been the law in Illinois that the amount of a verdict is largely within the discretion of the jury. *Kahn* v.

James Burton Co., 5 Ill. 2d 614; *Bucher* v. *Krause*, (7th cir.) 200 F.2d 576, cert. den. 345 U.S. 997; *Holsman* v. *Darling State Street Corp.*, 6 Ill. App. 2d 517.

In the case at bar, plaintiff, a woman of 50, sustained a fracture of the right femur requiring surgery, was unable to walk without crutches for almost three years, and presently has a stiffening of the right hip joint and knee. Her condition is permanent and progressive. She has incurred special damages of $1500, and there is testimony that she will have to submit to an arthroplasty to separate the head of the femur from the acetabulum. It is true that the verdict is large in comparison to the expenses of plaintiff, but we cannot limit compensable damages for pain and suffering to a set percentage of medical, hospital and kindred expenses. Costly surgery may result in complete recovery for one person, while the total of the foregoing expenses incurred by a multiple amputee may be small. Each verdict for a personal injury must be examined in the light of the particular injury involved, with humble deference to the discretion of the jury in making its determination and to the ruling of the trial judge on the post-trial motions. *Johnson* v. *Eskberg*, 94 Ill. App. 635.

We are not unmindful of our obligation to carefully scrutinize the record to determine whether the amount of the verdict is so large as to indicate passion and prejudice. This we have done, and we conclude from the evidence that although the verdict may well be in excess of the amount which the judges of this court would have allowed if they had heard the evidence and made the original determination, yet we do not believe that it is so excessive as to show passion or prejudice.

We therefore conclude that the verdict and judgment below are correct and the judgment is affirmed.

Judgment affirmed.

Appendix B.

Judgment of the Supreme Court of Illinois

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of March in the year of our Lord, one thousand nine hundred and fifty-nine, within and for the State of Illinois.

Present: Joseph E. Daily, Chief Justice.
Justice Walter V. Schaefer
Justice George W. Bristow
Justice Harry B. Hershey
Justice Ray I. Klingbiel
Justice Charles H. Davis
Justice Byron O. House
Latham Castle, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 20th day of March 1959, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Margaret B. Lau,
Appellee
No. 34981 vs.
West Towns Bus Company, an Illinois corporation,
Appellant

Appeal from Superior Court Cook County 58 S 3224 Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Superior Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant costs by her in this behalf expended, to be taxed, and that she have execution therefor.

Appendix C.

State statutes whose validity is involved.

Ill. Rev. Stat. 1957, Ch. 110, §34:

§34. Prayer for relief.) Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. Relief, whether based on one or more counts, may be asked in the alternative. Demands for relief which the allegations of the pleadings do not sustain may be objected to on motion or in the answering pleading. Except in case of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise. In case of default, if relief beyond that prayed in the pleading to which the party is in default is sought, whether by amendment, counterclaim, or otherwise, notice shall be given the defendant party as provided by rule.

(Amended by Act approved July 19, 1955)

Ill. Rev. Stat. 1957, Ch. 110, §46:

§46. Amendments.) (1) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was

intended to be brought or the defendant to make a defense or assert a cross demand.

(2) The cause of action, cross demand or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross demand interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving as aforesaid the cause of action, cross demand or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

(3) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.

(4) A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (a) the time prescribed or limited had not expired when the original action was commenced; (b) failure to join the

person as a defendant was inadvertent; (c) service of summons was in fact had upon the person, his agent or partner, as the nature of the defendant made appropriate, even though he was served in the wrong capacity or as agent of another; (d) the person, within the time that the action might have been brought or the right asserted against him, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him; and (e) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.

(Amended by Act approved July 19, 1955)

Ill. Rev. Stat. 1957, Ch. 110, §54:

§ 54. Abatement—Change of interest or liability—Substitution of parties.) (1) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be be-

fore the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause.

(2) Death. If a party dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion. If a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party.

In the event of the death of a party in an action in which the right sought to be enforced survives only as to the remaining parties to the action, the action does not abate. The death shall be suggested of record and the action shall proceed in favor of or against the remaining parties.

No action brought for the use of another abates by reason of the death of the plaintiff whose name is used but may be maintained by the party for whose use it was brought in his own name upon suggesting the death of record and the entry of an order of substitution.

(3) Incompetency. If a party is declared incompetent, that fact shall be suggested of record and the prosecution or defense shall be maintained by his representative, guardian ad litem or next friend, as may be appropriate.

(4) Trustees; public officers. If any trustee or any public officer ceases to hold the trust or office and that fact is suggested of record, the action shall proceed in favor of or against his successor.

(5) Service of process. Parties against whom relief is sought, substituted under subsections (1) and (2) hereof, shall be brought in by service of process. Service of process on parties substituted under subsections (3) and (4) hereof is not required, but notice shall be given as the court may direct.

(Amended by Act approved July 19, 1955)

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,

Appellant,

vs.

MARGARET B. LAU,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM.

JAMES A. DOOLEY
111 W. Washington Street
Chicago 2, Illinois
Attorney for Margaret B. Lau,
Appellee.

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,

Appellant,

vs.

MARGARET B. LAU,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM.

Comes now Margaret B. Lau, Appellee herein and moves to dismiss or affirm this appeal from the judgment of the Supreme Court of Illinois, on the ground that the matters before the court do not present a substantial federal question, and the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE.

On May 10, 1952, while Chicago & West Towns Railways, Inc., was in process of reorganization in the District Court, and was being operated by Raymond T. O'Keefe, Jr., a trustee appointed by that court, appellee was injured through the negligence of a bus driver, a servant of the reorganization trustee. On March 9, 1953, she brought suit for damages against the trustee in a State court.

Before the suit could be brought to trial the reorganization proceedings were completed and appellant, a reorganization of the original debtor corporation, took the company over, subject to all claims or obligations incurred during the trustee's operation of the property, and on July 2, 1954, a final vesting order was entered, under the terms of which appellant was charged with and assumed the obligations of the Trustee, as follows, among other things:

"(6) The Company shall have the right, if it so elects, to be substituted at its own cost and expense as a party in lieu of the Debtor or of the Trustee in any or all litigation or proceedings by or against the Debtor or the Trustee or to which either of them were parties, now pending, on appeal or otherwise, or to continue such litigation or proceedings in the name of the Debtor or of the Trustee, and the Trustee shall be relieved of any further duty or responsibility in respect of such litigation or proceedings.

"(7) The Company is authorized and directed to pay, in due course, all costs and expenses of administration of the estate of the Debtor which shall be a charge upon the properties herein authorized to be transferred and conveyed to the Company . . .

"The Company shall assume at the Closing Time and pay in due course without the further order of this Court, the following claims:

"(a) Any claims of creditors entitled to priority by reason of the Bankruptcy Act or of any State or Federal law; . . . .

"(8) From and after the Closing Time there shall be no liability upon the Trustee for any obligations incurred by him in his official capacity as such Trustee growing out of his operation theretofore of the property and business of the Debtor pursuant to the authorizations of this Court, and the Company shall

be and become liable for any and all such obligations and shall indemnify and hold the Trustee harmless against such obligations."

Thereafter on September 21, 1956, and more than four years after appellee's injuries were sustained, a final decree was entered in the reorganization proceedings, and O'Keefe was discharged as trustee (A. 91, 96).

On February 15, 1957, present counsel substituted for counsel theretofore representing O'Keefe, but made no attempt to substitute the corporation in place of the trustee, as defendant (A. 4).

On January 29, 1958, leave was given to appellee to increase the *ad damnum* in her suit from $35,000 to $175,000 (A. 5).

On February 28, 1958, appellee obtained leave to amend her complaint by substituting the corporation as defendant in lieu of O'Keefe, and dismissed the defendant Hathaway (A. 5).

On the same date the defendant, West Towns Bus Company, sought leave to file a so-called counterclaim in which it alleged the following:

"1. That prior to May 10, 1952 and ever since then West Towns Bus Company, counter-plaintiff, was a corporation duly organized and doing business under the laws of the State of Illinois as a common carrier of passengers for hire.

"2. • • •

"3. That at the time and place aforesaid, prior to and at the time of the occurrence of said collision complained of by plaintiff, Counter-plaintiff, West Towns Bus Company, was in the exercise of due care and caution for its own safety and for the safety of others.

"4. Counter-plaintiff, West Towns Bus Company owed plaintiff, as a passenger on one of its buses, the highest degree of care; that counter-plaintiff, if guilty of negligence, would only be guilty of a passive or technical negligence and is, therefore, entitled to indemnity from the counter-defendant, William Hathaway, who was guilty of active negligence or omissions which constituted the proximate cause of the injuries to the plaintiff, Margaret B. Lau." (R. 51, 52, 53, A.A. 1)

On April 1, 1958, West Towns Bus Co. moved for leave to file its appearance and answer, setting up the statute of limitations, and insisting on its non-liability since it was not a party to the original complaint (A. 6, 12). This motion was denied (A. 14), and it was ordered that the appearance and answer in behalf of O'Keefe stand as the appearance and answer in behalf of West Towns Bus Co.

On the same day the appellee filed an amended complaint, setting up the same cause of action as originally pleaded but naming West Towns Bus Co. as defendant instead of O'Keefe (A. 12, 14).

It is averred that plaintiff on April 1, 1958, filed an amended complaint containing "new specific allegations of negligence." The Illinois Supreme Court has held that new allegations of negligence may be filed after the limitations period has expired, provided they pertain to the same transaction or occurrence. (*Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N.E. 2d 838 decided in 1938.) This Court reached the same conclusion in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574.*

* Sec. 46(1), Chap. 110, Ill. Rev. Stat. provides as follows: "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the

1

Appellant's claim that the amendment increasing the ad damnum was repugnant to the Bankruptcy Act.

Appellant states that Chapter 10 of the Bankruptcy Act requires that there should be disclosure to the district court of the maximal liability on all claims against the estate. Appellant fails to point out the particular Section of the Act which is relied upon; we submit that nowhere in the Act is there any provision requiring a person, injured by the Trustee's servants during the operation of the business of the debtor, to make complete disclosure of the ultimate, maximum liability of the Trustee, under penalty of having the injured person's claim reduced in amount. When the Trustee injures a person during his conduct of the business, that person becomes vested with the rights that any other injured person has against any other tort feasor, and may enforce them in the same manner and to the same extent.

No showing has been made that the appellant considered appellee's claim in determining whether it would take over the system. No showing has be a made that the appellant ever contacted the appellee, or instituted any inquiries as to the nature or extent of her injuries, or had any interest whatever in the subject.

The amendment increasing the *ad damnum* was permitted in accordance with the long standing rule in Illinois.

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*(Continued)
cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand."

Section 34, Chap. 110 Ill. Rev. Stat.* permits such an amendment. The argument is made that this Section was adopted after the appellant's rights had accrued; however, this Section merely codified the existing Illinois law as exemplified in *Tomlinson* v. *Earnshaw*, (1884) 112 Ill. 311 and *Geneva Construction Co.* v. *Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 122 N.E. 2d 540, decided in 1954.

It has many times been held that statutes enlarging a remedy already existing do not offend vested rights; that no one has a vested right in rules of practice or modes of procedure (*Grivas* v. *Parmelee T. Co.*, 207 Fed. 2d 334, 347 U.S. 913.) It has also been held that no one has a vested right in the statute of limitations (*Chase Security Corp.* v. *Donaldson*, 325 U.S. 304). In taking over the estate from the trustee the company acted with knowledge of this right accorded to the plaintiff under the Illinois law for almost 80 years. Additionally, the Illinois law affords ample avenues of discovery under which the defendant could apprise itself as to the exact nature, condition and extent of the plaintiff's injuries. No showing is made that appellant ever was influenced in its actions by the amount of the *ad damnum*, or even knew what it was.

Appellant repeatedly makes the statement that the claim of the appellee has no priority and was not an operating expense. In support of this position *Brooks* v. *St. Louis & San Francisco Ry. Co.*, 180 F. 2d 185 and *In re New York N.H. & H. R. Co.*, 92 F. 2d 428 are cited. In each of these cases the tort inflicted on the claimant

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* Sec. 34, Chap. 110, Ill. Rev. Stat.: . . . "Except in case of default, the prayer for relief does not limit the relief obtainable . . ."

occurred prior to receivership; in our case the bus which injured appellee was operated by O'Keefe, reorganization trustee. It is well settled that damages for injuries to persons or property during a receivership, caused by the torts of the receiver's servants, are classed as a part of the operating expenses and are entitled to the preference accorded such claims. (*McCullough* v. *Union Traction Co.*, 186 N.E. 300, 206 Ind. 585; *Beale* v. *Moore*, 32 S.E. 2d 696, 183 Va. 519; 75 C.J.S. 943; *Bartlett* v. *Cicero L H & P Co.*, 177 Ill. 68, 52 N.E. 339). It is further settled that claims for receivership expenses have precedence over the mortgage bonds of the debtor. (*Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U.S. 434, 464, 481; *Burke* v. *Morphy*, 109 F. 2d 572, cert. den. 310 U.S. 635.) Therefore it is immaterial whether the lienholders of the reorganized company took into account the *ad damnum* in appellee's lawsuit, since it had priority over their liens in any event. The security holders did not and could not "change their position" relative to appellee's claim. Furthermore, the security holders are not parties here, and are not complaining.

Attention is called to the statement in the Illinois Supreme Court's Opinion that the amount awarded plaintiff might be in excess of the amount which the court would have awarded had it made the original determination. Appellant cites *Foust* v. *Munson Steamship Lines*, 299 U.S. 75, apparently in an effort to show that the Illinois courts failed to do their duty.

It is clear from the Opinion of the Illinois Supreme Court that the question of whether the damages were excessive was considered and passed upon. It is not open here.

In increasing the *ad damnum* prior to trial, plaintiff was only exercising the right granted uniformly to plain-

tiffs in Illinois for many years, a right of which appellant was well aware. Appellant has failed to show any injustice as a result of plaintiff's exercise of this right.

2

Appellant's claim that the holding of the state court that the state two-year limitation statute should not be applied here because an amendment to the state practice act adopted after the Consummation Order would make such amendment invalid as repugnant to the Bankruptcy Act.

This question is based on a series of false assumptions. As we have seen, appellant took over the estate of the debtor burdened with the claims for operating expenses, of which plaintiff's claim was one. At the time of the Consummation Order, July 1, 1954, the time for bringing suit under Illinois Statute of Limitations had already expired. Consequently, the defense of the Statute, if it ever existed, was as valid the day of the Consummation Order as it is today. Counsel is in error in assuming that the two-year period under the statute would commence at the date of the order. In Illinois, the statute begins to run the day of the accident. (Sec. 1.11, Chap. 131 Illinois Revised Statutes; *Roth* v. *Lundin*, 237 Ill. App. 456.) Therefore appellant is forced into the anomalous position of asserting that it accepted liability for operating claims of the debtor corporation, at the same time asserting their invalidity as to it. Appellant urges the inequity of requiring it to assume a claim in an amount larger than the *ad damnum;* is it to be assumed that the bankruptcy court would have permitted appellant to take over the debtor estate, had it known that appellant would thereafter repudiate its obligations thus assumed?

Appellant asserts that the record does not show an express assumption of obligations by it, which, it claims,

was required by the order. The order provides that the Trustee is relieved of liability for all obligations incurred in the operation of the property, "and the Company shall be and become liable for any and all such obligations." No express assumption, other than that contained in the order, was required. The appellant became liable by accepting the property under the conditions prescribed by the order.

3

Appellant's claim that the imposition of liability following the transfer of assets is repugnant to the Bankruptcy Act.

Appellant here first repeats the fallacy, already exposed, that appellee's claim was not an operating expense. Under Point I we have cited the authorities holding to the contrary and have shown that the *Brooks* case, cited by appellant is not in point.

Since appellee's claim is an operating expense, it clearly falls within the class of liabilities specifically imposed on appellant under the Consummation Order; no proof was necessary that this claim was specifically mentioned in that order.

The liability in this case was essentially against the fund in the hands of the trustee, and not against the custodian. Regardless of devolution of title, the liability followed the fund. *McNulta* v. *Lochridge*, 137 Ill. 270, 27 N.E. 452, affirmed 141 U.S. 327. *Bartlett* v. *Cicero Light Co.*, 177 Ill. 68, 52 N.E. 339.

A similar point was raised in *McNulta* v. *Lochridge*, 141 U.S. 327, and this court held that whether a successor receiver can be held liable for his predecessor's torts did not present a Federal question.

Appellee in this case followed the only course which it was possible for her to pursue. She filed a suit promptly against the person responsible for her injuries. At that time the present appellant corporation was not in existence, nor was it created at any time within the two-year statute of limitations. When the trustee who had injured her was discharged, he no longer was liable for her injuries. If she filed a new suit against the present appellant, the statute of limitations would have been pleaded. The only possible course for her to adopt was to have the appellant (who already was defending the suit) substituted as party defendant.

It is submitted that nothing in the Bankruptcy Act was contravened by the procedure adopted in this case, and this appeal should therefore be dismissed for lack of a substantial federal question.

Respectfully submitted,

JAMES A. DOOLEY
111 West Washington Street
Chicago 2, Illinois
Attorney for Margaret B. Lau, Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,

Appellant,

vs.

MARGARET B. LAU,

Appellee.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEE TO DISMISS OR AFFIRM.

EDWARD S. MACIE,
111 West Washington—Suite 1742
Chicago 2, Illinois
Attorney for West Towns
Bus Company, Appellant

The Scheffer Press, Inc.—ANdover 3-6850

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3. The holding of the state court that the transfer of the mortgaged bus line assets by the reorganization trustee to the reorganized debtor would, ipso facto make appellant liable for negligence claims of non-employees against the trustee, is repugnant to the National Bankruptcy Act, and the rights, titles, privileges and immunities thereunder. 9

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Appellee.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEE TO DISMISS OR AFFIRM.

ARGUMENT.*

Appellee overlooks that the National Bankruptcy Act expressly enacts (USC Tit. 11, Sec. 626) that the property dealt with by the plan when transferred by the trustee to the reorganized debtor "shall be free and clear of all claims and interests of the debtor, creditors and stockholders" except as otherwise provided in the plan or the

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* In Statement of the Case, appellee states (pp. 3-4) that appellant "sought to file a so-called counterclaim" which appellee purports to quote. The trial court denied leave to file this paper (add. abs. 1, rec. 58) and the paper never became part of the record. Appellee offers no suggestion as to how or why the paper would be competent or relevant on any issue here.

order of confirmation or transfer, and that therefore the burden here was on appellee to show that appellee came within the named statutory exceptions, which burden appellee has not met. Appellee's basic error is the assumption that the question of the liability of appellant is solely a matter of state law, unaffected by the National Bankruptcy Act. Under the U. S. Constitution, the National Bankruptcy Act is the supreme law of the land and if there is a conflict between the Bankruptcy Act and the state law, the former must prevail.

Appellee's Motion is entitled "to dismiss or affirm," but since the Motion seemingly does not question the substantial character of appellant's federal grounds, nor that they were adequately presented below, the motion in substance is to affirm.

1. *The holding of the state court that after a reorganization plan has been approved and consummation order entered on the basis of the existing claims against the trustee, including a state court suit with a named ad damnum, nevertheless, under the provisions of the state practice act, the state court has power thereafter to allow the ad damnum to be increased, would make such provision of the state practice act invalid because repugnant to the National Bankruptcy Act.*

(Juris. Stat. 1, pp. 11-16; Mo. Appellee 1, pp. 5-8)

Appellee (p. 5) argues that there is no specific provision in the Bankruptcy Act requiring the disclosure of the maximal liability claimed by appellee. Such requirement is implied and is plainly inferable from other provisions of the Act; cf. Sec. 567 (the duty of the trustee to submit a statement of the property, liabilities and financial condition of the debtor), Sec. 569 (the duty of the

trustee to prepare a plan or a report why a plan cannot be effected), Sec. 616 (the plan of reorganization "(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge; . . . (6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them"), Sec. 621 "The judge shall confirm a plan if satisfied that . . . (2) the plan is fair and equitable, and feasible; . . ." As argued in appellant's Jurisdictional Statement, in order for an informed judgment to be made by the security holders in accepting the plan and by the court in confirming it, there must be full disclosure as to what is the maximal amount of the existing claims particularly if the reorganized corporation is to have any liability therefor. Appellee (p 5) argues that there is no provision requiring a person injured by the trustee's servants during the operation, "to make complete disclosure of the ultimate maximum liability of the trustee under penalty of having the injured person's claim reduced in amount." Appellee avoids the issue; appellant is not asking to have appellee's claim reduced in amount from what it was *at the time* the plan was accepted and confirmed, but is seeking to prevent appellee from increasing the amount *after* such acceptance and confirmation. Appellee says (p 5): "No showing has been made that the appellant considered appellee's claim in determining whether it would take over the system." The answer is obvious; if, as appellee contends, the plan makes appellant liable for the claim, the amount of the claim (and of any other claims) would be a factor that the security holders and the district court and the reorganized debtor would have to consider before the plan was accepted, confirmed and consummated. The security

holders and the court might well agree that the debtor could be reorganized and assume claims totalling *X* dollars but be unwilling to agree to such reorganization if the claims to be assumed would total *5X* dollars. Appellee (pp 5-6) states that the amendment, increasing the ad damnum "was permitted in accordance with the long standing rule in Illinois." Assuming, arguendo, that this is correct, the argument does not meet appellant's point that in an action against a bankruptcy reorganized debtor the right to make such an increase is to be governed by the provisions of the National Bankruptcy Act.

In Juris. Stat. (p. 12) appellant argued that the claim of appellee, a non-employee, against the trustee for the latter's alleged negligence was not a reorganization operating expense and had no priority therein. Appellee (pp. 6-7) takes issue. *In re New York, N. H. & H. Ry. Co.*, 2 Cir. 1937, 92 F. 2d 428, cited by appellant, was a holding that such a claim had no priority either under Tit. 11, 205(b) or 205(n), the court pointing out that 205(n) gives preference to "claims for personal injuries to employees" but does not extend the protection to others, non-employees. The court said there:

> "It would in any case be utterly fantastic to suppose that any passenger would be deterred from travelling on a road because a judgment for any injuries he might suffer would not be a prior claim. Yet only on some such theory can it be supposed that the case falls within subdivision (b). Perhaps subdivision (n) should have extended the protection, but it did not. McCullough v. Union Traction Co., 206 Ind. 585, 186 N.E. 300, does indeed go the whole way, but it stands alone against the uniform federal authorities."

It is true that the reorganization in the instant case was not under section 205 (the Railroad Corporation Act) but was under Chapter X, Section 501 *et seq.* Appellant submits however that the fact that Congress made the limited extension of preference protection in 205(n) to employees of railroads but not to passengers, and made no extension of preference whatever in Chapter X, is an indication of legislative intent that such claims shall not be preferred.

Appellee (p. 7) states that it is "well settled that damages for injuries to persons or property during a receivership . . . are classed as part of the operating expenses and are entitled to the preference accorded such claims." Appellee cites 3 cases: McCullough v. Union Traction Company, 186 N.E. 300, 200 Ind. 585; Beale v. Moore, 32 S.E. 2d 696, 183 Va. 519 and Bartlett v. Cicero L. H. and P. Co., 177 Ill. 68, 52 N.E. 339. *McCullough* and *Bartlett* involved injured employees, *Beale* involved a claim for attorney's fees; in none of the cases was there any question of the application of the National Bankruptcy Act. Further *McCullough* was cited In re New York, etc., 92 F. 2d 428 above as standing "alone against the uniform federal authorities." In *Bartlett* the state court recognized that the general rule was that a corporation would not be liable for the negligence or torts of the receivership employees except when it was alleged and proved that the receiver had applied his receipts to the improvement and betterment of the corporation's property, in which case the corporation would be liable for the receiver's negligence *pro tanto* to the amount received from him. The state court in *Bartlett* held that because of the allegation in plaintiff's declaration that such improvement had resulted, that the declaration stated a cause of action and that defendant should answer same, the court saying, 177 Ill. 68, 73:

(p. 73): "The main question, presented by the demurrer to the amended declaration in the present case, is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation; and where, by stipulation between the parties, the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership? *As a general rule, a corporation,* while its property is in the hands of a receiver, has no control over either the receiver or his servants, and, therefore, *in the absence of any liability imposed by statute, is not responsible for the negligence or torts of the employes of the receiver; and no suit for damages occasioned thereby can be maintained against the corporation itself.* But there is an exception to this rule which will be hereafter stated.

"The amended declaration in this case contains the following averment: 'And the plaintiff avers further, that during the receivership the said receiver had the entire management and control of the business of the defendant company, collected large sums due it, sold its bonds and other property, and applied the receipts to the running of the business of the company *and to the improvement and betterment of the company's property,* and that the said property at the close of the receivership was without reservation turned back into the possession of the company.'" (emphasis supplied)

The court concluded that demurrer to the declaration should not have been sustained,

(p. 78) "If the corporation desires to set up that it is only liable for claims of this character to the amount of the net income during the receivership which has been applied to the improvement and bet-

terment of the property, the fact of the payment of such claims to an amount equal to the value of the improvements, if such fact exists, presents a question which the corporation must raise by the pleadings. (20 Am. & Ency. of Law, p. 390, and cases cited in note 1.)"

To sum up: Appellant, under Tit. 11, sec. 626, took the bus property here free and clear of all claims, except as therein provided and appellee has not shown that appellee's claim falls within any statutory exception. Further even if the National Bankruptcy Act could be disregarded, appellant would have no liability here, absent any allegations or showing that net income, if any, from the trustee's operation had gone into the improvement or betterment of the bus property.

2. *The holding of the state court that notwithstanding the provision of the consummation order that appellant's obligation to pay claims shall be subject to all applicable statutes of limitation, nevertheless, the state limitation statute should not be applied because of a later adopted amendment to the state practice act—would make such amendment invalid as repugnant to the National Bankruptcy Act.*

Juris. Stat. pp. 16-18 Mo. Appellee, pp. 8-9.

Neither in the state court opinion nor in appellee's Motion here, is there any reference to the specific language of the Consummation Order (par. 7, abs. 84) that the obligation of the reorganized debtor shall "be subject to any and all applicable statutes of limitation" and that, therefore, the action against appellant, begun over two years after the consummation order, was barred. Appellee (p. 8) states that "appellant took over the estate of the debtor burdened with the claims for operating expenses of which plaintiff's claim was one." This

statement has no support in the record. Appellant took over the estate of the debtor free and clear of all rights, claims of creditors, except "(d) All claims and obligations falling within the classes of claims which the Trustee has been authorized to incur or pay in the operation of the properties of the debtor or otherwise by any order or orders of the court." (par. 7, abs. 84). Appellant repeats that the record contains nothing bringing appellee's claim within this class, *because there is no showing that the trustee was ever authorized by any order of the bankruptcy court to incur or pay negligence claims by non-passengers.*

Appellee (p. 8) argues that since at the date of the consummation order, July 1, 1954, two years had already run from the accident date, May 13, 1952, the two year statute could not have been applicable to the reorganized debtor's liability. Appellee overlooks that in any cause of action, the statute commences to run only from the time the cause of action accrues and suit could have been brought; (54 C.J.S. Limitation of Actions, § 109 When right accrues, §110—Right Dependent on Future Event). Any cause of action against appellant accrued and suit thereon could have been brought on July 1, 1954 and the two-year statute commenced to run on that date. The consummation order, par. 7, abs. 84, expressly provided that debtor's obligation shall in each case be subject to the applicable statute of limitation so that appellant's obligation was subject to an action being brought against it within two years from July 1, 1954. Appellee is significantly silent about this provision of the order. Since appellee did not sue appellant within the two years from July 1, 1954, any obligation of appellant was thereby barred by the bankruptcy order.

Appellee cites Ill. Rev. St. Ch. 131, sec. 1.11, (which relates to computation of time) and Roth v. Lundin, 237 Ill. App. 456 (1925) (that an action brought in June 19, 1923 on accident occurring June 19, 1921 was timely); the relevancy of these citations does not appear. Appellee (p. 8) asks: "is it to be assumed that the bankruptcy court would have permitted appellant to take over the debtor estate, had it known that appellant would thereafter repudiate its obligations thus assumed?" Appellant has not repudiated any obligation, but is insisting that any obligation is, under the National Bankruptcy Act, limited by the terms of the Consummation Order, and that whatever obligation that order imposed was on the basis of the claimed *ad damnum* of $35,000 and on condition that action be brought against appellant within the statutory two year limitation period from the date of the transfer of the bus property by the trustee to appellant. Appellants asks in turn: is it to be assumed that the bankruptcy court would have refrained from enforcing in the reorganization proceeding a speedy liquidation of appellee's claim if the court knew that appellee proposed thereafter in the state court to increase the *ad damnum* by 400% and to wait over two years before asserting any liability against appellant?

3. *The holding of the state court that the transfer of the mortgaged bus line assets by the reorganization trustee to the reorganized debtor, appellant here, ipso facto made appellant liable for negligence claims of non-employees against the trustee, is repugnant to the National Bankruptcy Act and the rights, titles, privileges and immunities thereunder.*

Juris. Stat. pp. 18-20; Mo. Appellee 9-10.

Appellee argues that appellee's claim is an operating expense as disclosed in appellee's authorities. Appellant

hereinabove has shown that the authorities cited by appellee were inapplicable because they were state court receiver cases and not involving the National Bankruptcy Act; also that in one of them, *Bartlett,* the court expressly stated that even under state law, the liability of the corporation would be limited *pro tanto* to the amount shown to have been applied out of the receiver's collections for the betterment and improvement of the corporation property. Appellee (p. 9) argues that the liability in this case "was essentially against the fund in the hands of the trustee, and not against the custodian," citing *Bartlett.* Appellee overlooks that in such case, the liability is limited to the amount, if any, by which the property has been improved or bettered during the receivership and that there is no showing here to that effect; that the inferences in the present case are all against any such improvement or betterment, as will appear from the fact that the first mortgage bond holders have under the plan taken a scaling down of the principal of their bonds to 65% of the face value and in addition been forced to accept a non-cumulative income bond.

Conclusion.

Appellant earnestly urges that the judgment of the state supreme court has construed and applied state statutes in a way that is repugnant to the National Bankruptcy Act and the U.S. Constitution; that this court should note jurisdiction of the appeal and reverse the judgment below.

Respectfully submitted,

Edward S. Macie
111 W. Washington St.
Chicago 2, Illinois
Attorney for West Towns Bus Company, Appellant